No. 87-1490

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

JOHN E. MALLARD,
Petitioner,
v.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR STATE BAR OF CALIFORNIA AS *AMICUS CURIAE*

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QUESTION PRESENTED

Does 28 U.S.C. section 1915(d) give a federal district court the power to compel an attorney to provide uncompensated services to those litigants proceeding *in forma pauperis*?

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INTEREST OF THE *AMICUS CURIAE*[1]

The State Bar of California submits this brief to present the Court with important information both about the potential impact

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1 Consent to the filing of this brief has been obtained from the parties to this action, and copies of their written consents have been lodged with the Clerk of the Court.

of this litigation on the members of the State Bar, and about the possible harm the decision of the lower courts in this case may work upon the public policy of meaningful access to the judicial system.

The State Bar of California has unceasingly participated in programs and activities to assist members of the judiciary and bar improve and maintain their professional responsibilities and ethical obligations, and to assist the courts in the maintenance and improvement of the judicial system, and has actively encouraged its members to accept court appointments and to volunteer to perform work *pro bono publico*. Moreover, the State Bar has become a national leader in the area of *pro bono publico* representation through its development of programs such as the Volunteer Legal Services Program. However, the bar has also recognized that it is not always financially feasible for any given attorney to render uncompensated legal services in potentially large and complex cases and that insufficient financial means may often significantly affect the competence of representation.

The principal issues to be resolved in this case concern powers and duties of the bench and bar with regard to appointment and compensation of counsel for indigent civil litigants proceeding *in forma pauperis* pursuant to 28 U.S.C. section 1915.

In view of its familiarity with these issues and because the ultimate determination of these issues will affect the administration of justice in California, the State Bar strongly urges that the Court carefully consider the effect that involuntary uncompensated services inevitably will have upon the quality of representation made available to the indigent.

SUMMARY OF ARGUMENT

Amicus, the State Bar of California, is aware that the issue presented in this case could be resolved by resort to the language of Title 28 U.S.C. section 1915(d).[2] Similarly, a decision could

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[2] The words of a statute are to be given their ordinary, contemporary meaning. *See, e.g., Caminetti v. United States*, 242 U.S. 470 (1917); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Section 1915(d) states that the courts may "request" an attorney to represent an indigent party. "Request" is generally defined as "to ask to do something." If Congress had intended to give courts the power to require attorneys to represent indigents without compensation rather than merely giving them the authority to request representation, it would have used "require" instead of "request."

Many courts, including the Ninth Circuit, have explicitly recognized the clear distinction between "require" and "request" in their interpretations of section 1915(d). *See United States v. 30.64 Acres of Land, More or Less, Situated in Klickitat County, State of Washington*, 795 F.2d 796, 801 (9th Cir. 1986) (court examined at length issue of the meaning of "request" as used in section 1915(d) and concluded that it did not authorize appointment of counsel to involuntary uncompensated service); *United States v. Leser*, 233 F. Supp. 535, 538 (S.D. Cal. 1964), *cert. denied*, 379 U.S. 983, *reh'g denied*, 380 U.S. 928 (1965) (lack of power to compel service under section 1915(d) "is implicitly recognized . . . inasmuch as that Section does not give the Court the power to . . . compel . . . an attorney to represent anyone, but merely gives the Court the power to *request* an attorney to do so") (emphasis in original); *Reid v. Charney*, 235 F.2d 47 (6th Cir. 1956); *Rhodes v. Houston*, 258 F. Supp. 546, 579 (D. Neb. 1966), *aff'd*, 418 F.2d 1309 (8th Cir. 1969), *cert. denied*, 397 U.S. 1049 (1970); *but see Peterson v. Nadler*, 452 F.2d 754 (8th Cir. 1971) (holding court had power to appoint counsel under section 1915(d) and expressing confidence that lawyers will cooperate); *Tyler v. Lark*, 472 F.2d 1077 (8th Cir.), *cert. denied*, 414 U.S. 864 (1973).

be reached by resort to the history and intent of section 1915(d).[3]

However, should the Court find it necessary to resort to extrinsic aids in order to interpret the language of section 1915(d), the State Bar of California submits that meaningful access to the judicial system for the indigent — the public policy that prompted passage of section 1915(d) — cannot be served by allowing courts to compel unwilling attorneys to render uncompensated services to the indigent on a basis that is fraught with conflict of interest and the likelihood of incompetent representation. Moreover, we contend that the interpretation of section 1915(d) urged by the District Court of Iowa contains serious Constitutional infirmities, including a clear and direct violation of the Fifth Amendment prohibition against the taking of property without just compensation.

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3 Title 28, U.S.C. section 1915 was first enacted in 1892 as Chap. 209, 27 Stat. 252 and, in pertinent part, read "that the court may request any attorney of the court to represent such poor person . . . ." The concern prompting passage of this bill was that access to the courts not be denied "for want of sufficient money or property to enter the courts under their rules." As Congress put it: "Will the Government allow its courts to be practically closed to its own citizens, who are conceded to have valid and just rights, because they happen to be without the money to advance pay to the tribunals of justice?" *52d Congress, 1st Session, House of Representatives, Report No. 1079, April 14, 1892.* The concern of Congress was thus with not barring access to those who lacked the money to pay court costs, and was not with providing compelled, uncompensated representation to the indigent, although a provision did allow the court to request an attorney to provide gratuitous representation.

ARGUMENT

I. THE PUBLIC POLICY SUPPORTING MEANINGFUL ACCESS TO THE COURTS FOR INDIGENT LITIGANTS WOULD BE ILL-SERVED BY THE INVOLUNTARY AND UNCOMPENSATED APPOINTMENT OF COUNSEL PURSUANT TO 28 U.S.C. SECTION 1915(d), FOR SUCH COUNSEL, BEARING A HEAVY FINANCIAL BURDEN WILL OFTEN BE UNABLE TO PROVIDE COMPETENT ASSISTANCE

The State Bar of California contends that the word "request" in section 1915(d) cannot be properly construed so as to give courts the power to compel uncompensated representation from attorneys. *See* n.2, *supra*. However, if the word "request" is deemed ambiguous or indefinite, the Court should turn to considerations of public policy to interpret the intended meaning. *See, e.g., Fullinwider v. Southern Pac. R.R. Co.*, 248 U.S. 409, 412 (1919); *see generally Sutherland, Statutory Construction*, Section 56.01 (4th ed.). The *in forma pauperis* provisions of the Judicial Code were enacted to implement the policy of facilitating access by indigents to the federal courts, and that policy should therefore inform any interpretation of the statute. *See, e.g., Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270, 285 (1956) ("'[i]n expounding a statute, we must . . . look to the provisions of the whole law, and to its object and policy'") (*quoting United States v. Boisdore's Heirs*, 52 U.S. 63 (1851)).

The policy of meaningful access to the courts will not be advanced by establishing a power on the part of federal courts under section 1915(d) to compel unwilling attorneys, without compensation, to represent indigent litigants.

A. Substantial Financial Burdens Are Imposed on Counsel in Accepting an Engagement Pursuant to 28 U.S.C. Section 1915(d)

Attorneys appointed to represent indigent parties, without provision for compensation or reimbursement, will be unable to provide their clients with meaningful representation in many, if not most, cases where assistance of counsel is needed. Attorneys who must maintain a large caseload in order to meet their overhead costs may be unable to devote the long hours to, or pay the high cost of, investigation, discovery and trial preparation needed in cases such as the action in which Mr. Mallard was appointed.

Out-of-pocket expenditures will be necessary in order to provide adequate representation. Failing to compensate appointed attorneys forces those attorneys to consider choosing between substantial out-of-pocket losses on the one hand and, on the other, forgoing the depositions, expert consultants and witnesses, travel costs, and other expenses that may be needed to provide adequate and effective representation. Imposing these untenable choices on attorneys will diminish meaningful access to the courts for the indigent civil litigant and will simultaneously threaten the profession's high ethical and professional standards.

The organized bar, including the State Bar of California, has actively supported the proposition that attorneys should volunteer their services when needed to represent the defenseless or the oppressed. California attorneys already do so in significant numbers.[4] However, when a complex and time-consuming case

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[4] Approximately 10% of the 91,587 California lawyers practicing in 1987 voluntarily participated in organized programs providing free legal assistance to those in need. 8 Cal. Lawyer No. 6, 74 (July 1988). Many more California attorneys volunteer their services *pro bono publico* in ways not affiliated with organized programs. *Id.*

is involved, it is unfair to both the litigant and the attorney to require uncompensated representation.

1. Because of the Increasing Costs of Maintaining a Law Practice, Many Attorneys Are Financially Unable to Devote Adequate Time to an Uncompensated Matter

Maintaining a law practice imposes increasing financial demands on lawyers. The standard of care for competent representation has changed, and that change, together with the increasing complexity of law, has increased both the time and the effort required for research, investigation and discovery. The sheer volume of decisional law, as well as annotated codes, digests, pleadings and practice forms, law reviews, and periodicals has made it unusual for a lawyer to research and investigate most cases without the assistance of specialized personnel or technology.

Many firms have modernized in response to the complexity of today's social, economic and legal environment and are allocating increasing percentages of their gross incomes to required automation, technology and specialized personnel. Other practitioners who have not yet brought advanced management systems into their law offices are finding that growing portions of their gross incomes go to support traditional overhead and personnel costs and the rising costs of necessary case investigation and discovery.

In 1986, before paying the lawyer, average overhead expenses associated with keeping the lawyer in his or her practice were 42.4% of gross fees. 28 Law Off. Econ. & Mgmt. 354, 355 (1987-88), analyzing Altman & Weil's *1987 Survey of Law Firm Economics*. Furthermore, in California, average expenses per lawyer amounted to 51.8% of gross revenues. *Id.* Between 1984 and 1987, overhead increased as a

percentage of gross receipts by approximately 10% in firms with 9 to 74 lawyers and by 15% in firms with 75 or more. In 1984, firms with 21 to 40 lawyers had an average overhead of 40% of law firm receipts, while in 1987 this figure was 10% higher. Firms with 75 or more lawyers went from 41% to 47%. Law Office Management & Administration Report, Issue 88-5, May 1988, at 15.

The growth of all fields of law and the introduction of new fields of law (*e.g.*, professional responsibility, computer liability law, E.R.I.S.A. tax law) have led many to specialize. This specialization in turn requires the purchase of even more research materials and reference tools. Both lawyers who specialize and those who do not find it necessary to continue their legal education, with most seminars costing anywhere from $70 to $1200 each. *See, e.g.*, PLI's Summer Calendar 1984, PLI News, Vol. 21, No. 31, April 23, 1984; ABA Master Calendar of Association Meetings for June 1, 1984; California CEB Calendar of Programs (April-June 1984). Ninety-eight percent of lawyers surveyed reported that they attend Continuing Education of the Bar courses, and the median number of courses taken in one year was 3.8. *1981 Economic and Management Survey*, Law Office Management Section, State Bar of California (June 1982).

As these statistics demonstrate, merely maintaining a law office is quite expensive. When viewed in conjunction with the increases in litigation costs noted above, it becomes apparent that involuntary, uncompensated appointment as counsel would have a severe financial impact on the average attorney. Not only must the attorney keep a law office running while working on a case which generates no income, but the attorney also forgoes opportunities to work on fee-generating matters and to attract new business. The attorney is thus forced by the court to reach into his or her own pocket and pay to keep a law office running while working on compelled and uncompensated matters. As

the following section discusses, the burden is likely to be substantial.

2. The Type of Litigation Which Will Typically Generate an Appointment Under Section 1915(d) Is, of Necessity, Complex and Therefore Expensive

According to established authority, a section 1915(d) request for counsel will be granted only in "exceptional circumstances," *see, e.g., Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980); *United States ex rel. Gardner v. Madden*, 352 F.2d 792 (9th Cir. 1965), and not if the litigant appears competent to handle the case on his own. *See, e.g., Rhodes v. Houston*, 258 F. Supp. 546, 579 (D. Neb. 1966); *Davis v. United States*, 214 F.2d 594, 595 (7th Cir. 1954). Consequently, cases in which section 1915(d) motions are granted are apt to be especially demanding.

Although the record below does not reflect the estimated actual expenditure of time and money necessary to represent the plaintiffs in this case, several facts indicate that this outlay would be substantial. Because there are three plaintiffs, two of whom are incarcerated at the Iowa State Penitentiary in Fort Madison, Iowa (Brief in Support of (1) Appeal of Denial of Motion to Withdraw and (2) Motion to Dismiss Appointment of Counsel, Civil No. 87-317-B, at 8), and eight defendants, and because the case is brought under 42 U.S.C. section 1983, alleging that defendants systematically filed false reports against plaintiffs and endangered plaintiffs' lives by exposing them as informers, it appears that extensive discovery will be necessary in order to establish the pertinent facts and to defend any disputed material facts. Discovery is an expensive and time-consuming, labor-intensive process.

The cost of discovery is found not only in the time spent by the attorney and the overhead costs for support staff and machines, ranging from photocopiers to computers. It is also seen in the cost of outside services which must be performed. For example, the fees of certified shorthand reporters for attending a deposition and producing transcripts often come close to the fees of the attorneys taking the deposition. Discovered documents will suggest new research projects. Investigation may be even more costly than discovery. Experts charge $100-$250 an hour and more for consultation, investigation, drafting of written reports, and expert testimony. Lawyers must pay for transportation, housing and meals of out-of-town or out-of-state experts, in addition to the costs involved in communicating with them through all phases of the case.

The question of interpretation of section 1915(d) extends far beyond the particular facts of the case in which Mr. Mallard was appointed. Statistics from other section 1983 actions challenging institutions illustrate the extensive amount of attorney time that may be necessary to successfully litigate a claim. *See, e.g., Cherco v. County of Sonoma,* No. 80-0334 TEH (N.D. Cal. Feb. 8, 1980) (5,091 attorney hours, 6,474.75 law clerk and paralegal hours); *Marin v. Rushen,* No. 80-0012 MHP (N.D. Cal. Jan. 3, 1980) (11,649 hours for a challenge to mental and medical care at San Quentin prison); *New York State Ass'n for Retarded Children, Inc. v. Carey,* 711 F.2d 1136 (2d Cir. 1983) (11,034 attorney hours); *Ruiz v. Estelle,* 553 F. Supp. 567 (S.D. Tex. 1982) (awarded $1,714,527 in fees). Although these are class actions, they help to illustrate the huge number of hours section 1983 claims involving institutional practices may entail.

The Bar Information Program of the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants has compiled statistics on the average time spent by attorneys representing indigent persons in federal *habeas corpus*

cases involving the death penalty. Such cases are certainly among those for which the appointment of unwilling counsel would be authorized if the Court affirms the decision below. In pertinent part, the study shows that at the federal district court level, the median number of hours spent litigating a post-conviction death penalty case was 305, and at the federal circuit court level, 320. *Caseload and Cost Projections for Federal Habeas Corpus Death Penalty Cases in FY 1988 and FY 1989,* at 38, prepared by the Spangenberg Group for Criminal Justice Act Division Administrative Office of the United States Court. Considering that the average attorney spends about 1,600 hours per year on his or her practice, *id.*, these figures demonstrate the large time commitments involved in undertaking such cases.

B. Lack of Adequate Financial and Time Resources, Impairing a Lawyer's Ability to Represent a Client Competently, Is Cause for an Attorney to Decline Appointment

Representation by counsel, mandatory or otherwise, is meaningless unless it is competent, adequate and effective. Moreover, the attorney's professional obligations and civil duty of care require a high standard of diligent and conscientious advocacy, free of conflict. Lack of adequate financial and time resources may well impair the lawyer's ability to provide the requisite high standard of representation.

1. The Legal Context in Which Today's Lawyer Practices Requires a Very High Level of Competent Performance to Meet Duties of Care Required by Professional Standards and Licensure Laws.

The minimum components of competence include adequate knowledge, skill, time, supervision of employees or subordinates, and resources. Resources include the personnel, equipment and finances required adequately to discharge the lawyer's duties to the client. Any deficiency in these components not only compromises the ability of the attorney to perform competently, but also places the attorney's financial interests in conflict with the client's interests, serving to impede the independent judgment required to be a conscientious advocate on behalf of the client. *See People v. Barboza,* 29 Cal. 3d 375, 627 P.2d 188, 173 Cal. Rptr. 458 (1981); *Maxwell v. Superior Court,* 30 Cal. 3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982); *Martin v. State Bar,* 20 Cal. 3d 717, 721, 575 P.2d 757, 144 Cal. Rptr. 214 (1978); *People v. Corona,* 80 Cal. App. 3d 684, 720, 145 Cal. Rptr. 894 (1978); *United States v. Hearst,* 638 F.2d 1190 (9th Cir. 1980), *cert. denied,* 451 U.S. 938 (1981); Formal Opinion No. 1981-64 of the Standing Committee on Professional Responsibility and Conduct of the State Bar of California, *California Compendium on Professional Responsibility* at pp. II A-187 through II A-190.

To perform legal services on the client's matter competently, a member of the bar must have adequate knowledge of the area or areas of law necessary. A lawyer must check sources of information carefully and scrutinize documents before giving professional advice. A lawyer also owes a client the civil duty to discover those additional rules of law which, although not commonly known, may easily be found by standard research techniques. Even in unsettled areas of law, the lawyer must undertake reasonable research to ascertain relevant legal principles and

to make an informed decision as to a course of conduct and theory of law, based upon an intelligent assessment of the problem. If a lawyer fails to do so, he or she may be liable to the client.

Under the Model Rules of Professional Conduct ("Model Rules") promulgated by the American Bar Association, a lawyer is prohibited from accepting legal employment if the lawyer does not have the requisite competence to handle a legal matter.[5] Furthermore, unreasonable financial burden is an approved reason to decline court appointments.[6]

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5 A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.1, ABA Model Rules of Professional Conduct (1987).

A lawyer shall not represent a client or, where representation has commenced, shall withdraw . . . if: . . . the representation will result in violation of the Rules of Professional Conduct .

Rule 1.16 *id.*

6 A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: . . . representing the client is likely to result in an unreasonable financial burden on the lawyer.

Rule 6.2 *id.*

2. Adequate Financial Resources Are a Necessary Part of Competent Representation

A lawyer who does not have adequate financial resources to discharge the responsibilities to the client (*e.g.*, to advance the costs of litigation or to pay overhead when he or she will receive no compensation) is not competent to accept or continue employment.

In California, Rule of Professional Conduct 6-101 recognizes that adequate financial resources and time are a necessary component of attorney competence. The rule requires that a lawyer refuse employment if the lawyer does not have both adequate resources and sufficient time to perform the services competently. If the lawyer discovers that he or she does not have the requisite resources and time to devote to the client's matter, the rule requires the lawyer to withdraw from employment.[7]

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7 RULE 6-101. FAILING TO ACT COMPETENTLY.

(A) (1) Attorney competence means the application of sufficient learning, skill, and diligence necessary to discharge the member's duties arising from the employment or representation.

(2) A member of the State Bar shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently.

(B) Unless the member associates or, where appropriate, professionally consults another lawyer who the member reasonably believes is competent, a member of the State Bar shall not

C. A Lawyer Must Decline Appointment if the Lawyer is Unable to be a Conscientious Advocate on Behalf of the Client

A lawyer must have undivided loyalty to the client's interests and must decline appointment if unable to be a conscientious advocate on behalf of the client. In order to ensure undivided loyalty, a lawyer may not accept or continue representation if the lawyer has a conflict of interest. *See* rules 4-101 and 5-102, California Rules of Prof. Conduct; Model Rule 1.7. A lawyer's personal financial interests may be a cause of conflict with a lawyer's advocacy of the client's interests. *See, e.g., Maxwell, supra; Hearst, supra.*

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(1) Accept employment or continue representation in a legal matter when the member knows that the member does not have, or will not acquire before performance is required, sufficient time, resources and ability to, perform the matter with competence, or

(2) Repeatedly accept employment or continue representation in legal matters when the member reasonably should know that the member does not have, or will not acquire before performance is required, sufficient time, resources and ability to, perform the matter with competence.

(C) As used in this rule, the term "ability" means a quality or state of having sufficient learning and skill and being mentally, emotionally and physically able to perform legal services.

(Amended by order of California Supreme Court, effective October 21, 1983.)

If the lawyer fails to exercise conscientious fidelity on behalf of the client or has a conflict of interest, the lawyer may be removed or disqualified. *People v. Marsden*, 2 Cal. 3d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970); *Big Bear Mun. Water District v. Superior Court*, 269 Cal. App. 2d 919, 75 Cal. Rptr. 580 (1969).

If a lawyer is compelled involuntarily to represent an indigent, there is a potential danger that the lawyer may favor fee-generating cases over non-fee-generating cases. A lawyer who is trying to make ends meet may fail to exert the effort required in the indigent's case, simply because his or her financial problems will not be helped by efforts on a non-fee-generating case. A lawyer who is struggling financially may also be disinclined to investigate potential defenses or spend money required to develop those defenses.

Notwithstanding the high standards and idealism of the legal profession, actual performance will determine whether or not involuntary appointment of counsel serves the policy of meaningful access to the courts. Can a lawyer who is forced by the court to represent a person whom he or she has not voluntarily accepted as a client make a commitment of conscientious fidelity to the client's cause? Even if the conscripted lawyer makes a conscientious effort to represent the client, the lawyer may inadvertently fail to take actions to protect client interests. The involuntary nature of a lawyer's appointment creates an inherent conflict of interest which can only lead to ineffective representation.

Significant attorney-client problems can thus be expected to flow from the imposition of mandatory uncompensated representation, including: (1) serious conflicts of interest between the attorney and the imposed client, resulting from disagreements over litigation tactics and the economic burdens on the involuntarily appointed attorney; (2) serious questions as to whether the

services of an involuntarily appointed attorney tend to be of significantly lower quality and less effective than those provided pursuant to consensual attorney-client relationships; and (3) serious problems of due process, equal protection, and fairness arising from the financial impact upon attorneys "selected" for appointment without reasonable compensation or without reimbursement of expenses. In order to provide meaningful representation, courts are required to appoint competent counsel capable of undivided loyalties.

D. The Only Feasible Method of Ensuring Competent Representation to the Disadvantaged, Absent Counsel Willing to Volunteer Competent Services, Is to Spread the Cost to All Citizens as the Social Cost of the Administration of Our System of Justice

While *pro bono* services rendered by members of the bar will always be an important supplement to publicly funded and administered legal aid, they cannot replace it. Indeed, there is reason for apprehension that involuntary appointments of counsel who would otherwise participate in organized *pro bono* programs may disrupt those programs. Most organized pro bono programs carefully direct their resources based on studies of how to serve the most severe needs for legal help. *Ad hoc*, case by case appointments may divert *pro bono* counsel away from serving even greater needs.[8] Thus, government must bear pri-

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8 Moreover, the few existing public interest law firms might be particularly inviting candidates for appointment because many such firms specialize in the areas of law raised by *in forma pauperis* litigants. These public interest firms are probably the least able to stretch their resources further. Involuntary appointment of a public interest firm would mean, in practice, shifting free legal help away from clients that the firm believes to be more in need.

mary responsibility for ensuring delivery of legal services adequate to ensure that all stand equal before the law.

Recent history teaches that public funding is critical for any significant progress to be made in providing the indigent with equal access to our state and federal justice systems or in affording the legal protections which those systems guarantee the more economically fortunate among us. Public funding is especially critical today, when the financial cost of providing competent and conscientious advocacy is high and steadily increasing.

The Legal Services Corporation Act specifically identified the premise that any meaningful satisfaction of the indigent's equal access rights to the civil justice system depended upon quality representation. In enacting this legislation, the Congress expressly found:

> . . . (1) [T]here is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances.

42 U.S.C. section 2996(1);

> . . . (2) [T]here is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program.

42 U.S.C. section 2996(2);

* * * * *

> . . . (6) [A]ttorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the *high standards of the legal profession*.

42 U.S.C. section 2996(6) (emphasis added).

However, the Legal Services Corporation is not currently meeting all the legal needs of the indigent, and the private bar is unable to make up the difference.

A solution to the unmet legal needs of the least among us cannot rest solely on the backs of private attorneys. It must, to be at all adequate, be supported by the entire populace. Fundamentally, the problem of effective access to the court system affects more than the immediate parties and the bar. It affects all citizens, for the cost of inefficient court proceedings prolonged by unrepresented parties is enormous. Furthermore, parties denied access to the courts often incur other social costs: abandoned mothers and children, unable to obtain and enforce support orders, are destined to rely on welfare; injured men and women unable to gain compensation for their injuries end up relying on public assistance; institutions designed to rehabilitate the criminal or to aid the mentally ill which instead abuse their power are allowed to continue harming their charges to the ultimate social and financial detriment of society.

Our system of justice is predicated on equality: the adversarial system expects that each side will have an equal opportunity to understand the proceedings and to state its case to a finder of fact. If people are forced to choose between dealing alone with urgent legal problems or abandoning their rights, they will lose their respect for the rule of law, and, on a more elemental level, justice will not be served. Any approach to solving the problem of equality of access to the courts must therefore be informed by a consideration of the tremendous stake which all of society holds in our system of justice.

As shown above, it would be financially difficult for the private bar to assume what is essentially a society-wide obligation. Because the financial burden will lead attorneys to do a less than adequate job of representation, mandatory uncompensated service as a solution to indigent court access is doomed to failure.

The foregoing concerns are at least reason to question the district court's interpretation of section 1915(d). To the extent that public policy is used to interpret section 1915(d), both separation of powers and judicial restraint dictate that the public policy ramifications be clear and unequivocal. If appointing uncompensated counsel will not actually implement the public policy of meaningful access to the judicial system, such an interpretation cannot be the definitive exegesis of section 1915(d). A modest and restrained judiciary should not resort to questionable solutions to important issues of public policy in order to interpret ambiguous statutes, particularly in light of the fact that in over 95 years the courts have not applied section 1915(d) in the manner asserted by this district court. Nothing in either the language or the legislative history of section 1915 demands the conclusion that attorneys may be compelled to serve without compensation. This, coupled with the substantial possibility that the district court's interpretation will actually do violence to the motivating policy of court access, requires that the issue be resolved legislatively. The issue of representation for the indigent is one for the legislative branch, and, at the least, cannot be implemented through a system of forced representation that is dubious in both interpretative legitimacy and ultimate efficacy.

There must thus be a solution which disperses the burden over the whole of society. Possibilities include increased funding for Legal Services, both at the federal and local levels, using interest earned on attorneys' client trust accounts, instituting a reimbursement or "judicare" program such as the ones utilized in Great Britain, parts of Canada and most other industrialized nations, using a percentage of punitive damage awards in civil cases to create a fund for the provision of services, etc. The options are numerous and need to be resolved by the legislature. However, lack of current legislative solutions does not justify visiting the considerable weight of the problem upon a tiny segment of society, the private bar, particularly when the visitation does nothing of substance to solve the problem and in fact may exacerbate it.

II. THE STATUTE MUST BE CONSTRUED TO AVOID VIOLATING THE FIFTH AMENDMENT PROHIBITION AGAINST TAKING PRIVATE PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION

Statutes must comport with the Constitution. Although interpretative presumptions favor the constitutionality of an act of the legislature, "[a]s a corollary of the presumption favoring constitutionality, the fact that one among alternative constructions would involve serious constitutional difficulties is reason to reject that interpretation in favor of another." *Sutherland, supra* at section 45.11. *See, e.g., United States v. Clark*, 445 U.S. 23, 33-34 (1980); *Application of United States*, 427 F.2d 639, 643 (9th Cir. 1970). Because, as demonstrated below, lawyers have a property interest in their time, the district court's interpretation of section 1915(d) must be rejected as violative of the Fifth Amendment in that involuntary appointment would constitute a taking of property without compensation.

The Fifth Amendment to the Constitution prohibits governmental taking of private property for public use without just compensation. U.S. Const. amend. V. Nothing in the language of the Amendment, nor in its subsequent interpretation by the courts, limits the definition of "property" to tangible physical assets. Rather, many attributes of the asset allegedly taken are considered, the most prominent of which is the economic impact

of the governmental action. Thus, the Court stated in *Kaiser Aetna v. United States* that it had been unable to

> develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. . . . Rather, it has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors – such as the economic impact of the regulation, its interference with reasonable investment-backed expectations and the character of the governmental action – that have particular significance.

444 U.S. 164, 175 (1979), *quoting Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *see also Prune-Yard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980). The Court also noted that "'[c]onfiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title.'" *Kaiser, supra* at 174, n. 8, *quoting Chicago, Rock Island and Pacific Railway v. United States*, 284 U.S. 80, 96 (1931). The Court has routinely transcended the barriers of literalism and applied a Fifth Amendment analysis to the essential attributes of the asset allegedly taken rather than merely to its outward manifestation, and has been concerned with the character of the government's action and its impact upon the affected party. *See Kaiser, supra.* Because the inquiry has focused on economic damage rather than on the physical nature of the asset damaged, the logic of the Court's analyses indicates that an attorney's time should be denominated property and subjected to the same analysis.

Examples of non-tangible property rights which the Court has held subject to the takings clause include, *inter alia*, the franchise of a corporation (*Monongahela Navigation Co. v. United States*, 148 U.S. 312, 344 (1893)); letters-patent for a

new invention (*James v. Campbell*, 104 U.S. 356, 358 (1882)); the right to draw a portion of water (*International Paper Co. v. United States*, 282 U.S. 399 (1931)); the value of liens held by material men (*Armstrong v. United States*, 364 U.S. 40, 50 (1960)). The concern of the Court in these and similar cases has been with the income-producing value of the right taken.

Moreover, a majority of state courts which have considered the issue of whether free work for indigent litigants is an enforceable duty of the private bar have held that it is not. *See State ex rel. Stephan v. Smith*, 242 Kans. 336, 747 P.2d 816, 835 (1987). As long ago as 1854 ("To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock," *Webb v. Baird*, 6 Ind. 13, 17 (1854)), and as recently as last December ("An attorney's advice and counsel is indeed his or her stock in trade," *Stephan*, 747 P.2d 816, 842 (1987)), courts have held that an attorney's time is property and subject to the takings clause.

In *Stephan*, the Supreme Court of Kansas examined the nature of the burden imposed on attorneys who are compelled to provide uncompensated legal services to indigent criminal defendants. Despite the fact that a Kansas statute mandated that compensation of $30 per hour be provided, the court found that the average overhead of the attorneys who testified in court exceeded $30 per hour, and noted that "some private attorneys are actually losing money when the State pays them less than it costs to keep their offices open, and they realize nothing for their personal services." *Id.* at 830. The court went on to hold that "[w]hen the attorney is required to advance expense funds out-of-pocket for an indigent, without full reimbursement, the system violates the Fifth Amendment. Similarly, when an attorney is required to spend an unreasonable amount of time on indigent appointments so that there is genuine and substantial interference with his or her private practice, the system violates the Fifth Amendment." *Id.* at 842. *Accord State ex rel. Partain v.*

Oakley, 159 W. Va. 805, 227 S.E.2d 314, 319 (W. Va. 1976) ("where . . . appointments . . . impair [the attorney's] ability to engage in the remunerative practice of law, or where the attorney's cost and out-of-pocket expenses attributable to representing indigent persons . . . reduce the attorney's net income from private practice to a substantial and deleterious degree, the requirements must be considered confiscatory and unconstitutional").

The *Stephan* court based its holding on the fact that "[a]ttorneys' services are their livelihood, and conscripting their services is akin to taking the goods of merchants or the taking of the services of an architect, engineer, accountant, or physician . . . . Moreover, when attorneys are required to donate funds out-of-pocket to subsidize a defense, they are deprived of property in the form of money." *Stephan, supra* at 842. *See also* Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar,* 12 U.C.L.A. L. Rev. 438 (1965); *accord Partain, supra* at 319 (it is "axiomatic that an attorney's time is his stock in trade and that at some point, the impositions made on that time constitute an effective deprivation of the right to engage freely in the profession"); *Bradshaw v. Ball,* 487 S.W.2d 294, 298 (Ky. 1972); *McNabb v. Osmundson,* 315 N.W.2d 9, 16 (Iowa 1982); *DeLisio v. Alaska Superior Court,* 740 P.2d 437, 438 (Alaska 1987) (under state constitutional provision). *Cf. Williamson v. Vardeman,* 674 F.2d 1211, 1215 (8th Cir. 1982) (Fifth Amendment violation when attorneys required to advance expenses out of own funds). *Compare People ex rel. Conn v. Randolph,* 35 Ill. 2d 24, 219 N.E.2d 337, 341 (1966), and *Bias v. State,* 568 P.2d 1269, 1272 (Okla. 1977) (in both cases, court found losses by attorneys so great as to be unconstitutional and ordered reimbursement).

After careful consideration of history and of the law from other jurisdictions, the *Stephan* court concluded:

> Attorneys, like the members of any other profession, have for sale to the public an intangible — their time, advice and counsel. Architects, engineers, physicians, and attorneys ordinarily purvey little or nothing which is tangible. It is their learned and reflective thought, their recommendations, suggestions, directions, plans, diagnoses, and advice that is of value to the persons they serve. It is not the price of paper on which is written the plan for a building or a bridge, the prescription for medication, or the will, contract, or pleading which is of substantial value to the client; it is the professional knowledge which goes into the practice of the profession which is valuable . . . .
>
> Attorneys make their living through their services. Their services are the means of their livelihood. We do not expect architects to design public buildings, engineers to design highways, dikes, and bridges, or physicians to treat the indigent without compensation . . . . We conclude that attorneys' services are property, and are thus subject to Fifth Amendment protection.

Id. at 841-42.

In *Menin v. Menin,* 79 Misc. 2d 285, 359 N.Y.S.2d 721 (Sup. Ct. 1974), the Court examined recent right to counsel cases, concluding that

> [n]owhere in the right to counsel cases does the Supreme Court state that counsel must be assigned to serve without compensation [cites omitted]. Indeed, in the very recent decision of *Gagnon v. Scarpelli,* . . . it was noted that one factor to be emphasized in requiring assistance of Appointed counsel is 'the financial cost to the State'. Implicit in the above statement is the requirement of payment for assigned legal representation.

Menin, supra at 725. The *Menin* court went on to hold that "in civil actions, lacking criminal overtones, counsel is not required to serve without compensation and, in fact, has the constitutional right to demand payment or reject the assignment." *Id.* at 729.[9]

Although this Court has not yet addressed the issue of whether the time of an attorney is subject to the takings clause, its other pronouncements on the issue provide guidance. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* 107 S. Ct. 2378 (1987), the Court held that government activities short of the exercise of eminent domain which amount to even a temporary taking are subject to the strictures of the just compensation clause. The Court declared that "[i]t is axiomatic that the Fifth Amendment's

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9 *Cf. State ex rel. Scott v. Roper,* 688 S.W.2d 757, 768-69 (Mo. 1985); *Family Div. Trial Lawyers of Superior Court-D.C., Inc. v. Moultrie,* 725 F.2d 695, 705-6 (D.C. Cir. 1984); *Bedford v. Salt Lake County,* 22 Utah 2d 12, 47 P.2d 193, 195 (1968); *Webb v. Baird, supra. But see United States v. Dillon,* 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied,* 382 U.S. 978 (1966); *Sparks v. Parker,* 368 So. 2d 528, 533 (Ala.), *appeal dismissed,* 444 U.S. 803 (1979); *United States v. 30.64 Acres of Land, supra.* However, those cases holding that compelling uncompensated services is not a Fifth Amendment taking rest their holdings primarily on the assertion that attorneys have an enforceable obligation to render uncompensated services. *Dillon, supra* at 635; *Sparks, supra* at 533. At best this is a premise which rests on questionable historical ground. For example, the English common-law examples of obligatory service were accompanied by various forms of compensation. *See* Shapiro, *The Enigma of the Lawyer's Duty to Serve,* 55 N.Y.U. L. Rev. 735, 743-53 (1980). The public service obligation on the part of lawyers, while extremely important to the profession, falls short of a valid basis for imposing on a particular lawyer a very substantial burden that should be borne more broadly.

just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id. quoting Armstrong v. United States,* 364 U.S. 40, 49 (1960).

In *United States v. Fuller,* 409 U.S. 488, 490 (1973), the Court observed that the "constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, . . . as it does from technical concepts of property law."

The juxtaposition of an analysis of the fundamental attributes of the Constitutional concept of property with an analysis of this Court's previous guidelines on the "takings" issue and the recent developments in state case law reveals that not only is there no logical reason that an attorney's time cannot be considered property, but that in fact the factors identified by the Court in *Penn Central, supra,* strongly support the conclusion that an attorney's time is subject to Fifth Amendment protections.

First, the economic impact of involuntary appointment would be great and in some instances may be devastating because, given today's economic environment, the commercial reality is that practicing law in a professionally responsible manner requires a significant commitment of financial resources. As shown above, the expenses of overhead and the escalating cost of discovery and litigation are a significant burden on an attorney, particularly one forced to render uncompensated services. Second, the district court's action in this case is a substantial interference with "reasonable, investment-backed expectations." A legal practice requires the investment of time and money to acquire a legal education, open and maintain a practice, obtain clients, keep abreast of current legal developments, and provide the level of representation necessary adequately to counsel one's clients. These investments give value to the time of the lawyer.

Fundamentally, therefore, an attorney's time and the fees that time generates are no less an investment-backed expectation than is a piece of real estate purchased by a buyer in anticipation of an increase in value or to use for a commercial venture.

The right to practice law is a protected property interest, *see, e.g., Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102 (1963); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957), and compelled uncompensated representation is surely a taking of property by the government for public use, in that it creates a serious economic impact on the attorney, and it requires the expenditure of his or her own funds in order to fulfill an essentially public and governmental function: the delivery of legal services to the indigent and the attendant fulfillment of the promise of American justice — equal access to the courts for all.

CONCLUSION

Present measures are insufficient in many cases to allow indigent persons meaningful access to the courts. Improvement is gravely needed. Interpreting section 1915(d) to allow appointment of involuntary, uncompensated counsel would create merely an appearance of improvement rather than the reality. The considerations of public policy and Constitutional law

discussed above lead the State Bar of California respectfully to submit that the judgment below should be reversed.

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